Supreme Court, U.S.
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No. 01-796

In the

Supreme Court of the United States

TIMOTHY HELSETH,

Petitioner,

versus

JOHN BURCH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT JOHN BURCH

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QUESTION PRESENTED

Whether the court of appeals correctly held the intent-to-harm standard of County of Sacramento v. Lewis applies to §1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender.

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RESPONDENT'S BRIEF IN OPPOSITION

Pursuant to United States Supreme Court Rule 15, Respondent John Burch hereby submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT OF CASE

A. Statement of Facts.

1. The Pursuit:

During the evening of August 21, 1995, an intoxicated Everett Contois got into an argument with his friends about how fast his car could go. *A-2, A-13, A-16, A-18, A-21, A-22, A-231.* Contois claimed his 1991 Chrysler LaBaron automobile could reach speeds of 160 m.p.h.. *A-2, A-3, A-13, A-16, A-18, A-21, A-22, A-23.*

Fellow partygoers Adam Dallman, Fred Johnson, and John Vezina challenged Contois' claims and the three of them got into Contois' vehicle with the understanding Contois was going to try to get his car up to 160 m.p.h. or more. *A-2, A-6, A-15, A-16, A-18, A-21, A-23.* Contois then drove his vehicle westbound on 109th Avenue in the City of Blaine, accompanied by Vezina, Dallman, and Johnson. *A-27.*

Shortly after midnight on Tuesday, August 22, 1995, City of Blaine Police Officer William Bott, a 10-year veteran with the City of Blaine Police Department, was patrolling in his marked squad car eastbound on 109th Avenue in the City of Blaine. *A-27, A-60, A-63.* Officer Bott observed a vehicle coming toward him on 109th Avenue. *A-64, A-68.* He activated his radar and clocked the vehicle at 111 m.p.h.. *Id.*

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1 All cites listed as A__ are to the Joint Appendix filed in the Eighth Circuit.

Contois saw the police car and figured he was going to be pursued. *A-3.* Contois admitted the speedometer on his vehicle said 117 m.p.h. when he first saw the police. *Id.* If Contois had not seen the Blaine squad car, it was his intention to try to reach speeds of 140 or 160 m.p.h. on 109th Avenue. *A-3, A-14, A-19.* After seeing the police car, Contois testified he had no intention of stopping and believed he would be able to get away from the police. *A-5.* As the suspect vehicle flew by, Officer Bott immediately turned around and began following, keeping the vehicle in sight. *A-27.*

Contois slowed briefly as he approached the intersection of 109th Avenue and Radisson Road and then accelerated through the intersection at a high rate of speed without stopping for the stop sign. *A-28, A-49, A-60, A-65.* Contois continued to accelerate rapidly. *A-28.* Officer Bott was a minimum of three blocks behind Contois, when he activated his red lights and siren. *A-27, A-28, A-63, A-64, A-68.* Contois was pulling away and Bott notified dispatch of his pursuit. *Id.*

Contois ran the stoplight at the major intersection of 109th Avenue and Minnesota State Highway 65 in Blaine, at a speed Officer Bott estimated at 70 to 80 miles per hour. Contois continued his attempt to elude Bott by driving through the four-way stop at 109th Avenue and Jefferson Street in Blaine at a high rate of speed. *A-28.*

Contois then turned southbound on University Avenue, against the red light and proceeded southbound on University until 101st Avenue, where he made an eastbound turn against a red light. Contois then sped south on Cloverleaf Parkway. *A-28.*

Officer John Burch, a City of Blaine Patrol Officer, with over 17 years experience, was monitoring the pursuit. *A-44, A-46, A-50.* Burch positioned his squad car on Cloverleaf facing north at the intersection of 99th Avenue and Cloverleaf Parkway. *A-50.* Officer Burch observed the suspect vehicle proceeding eastbound on 101st toward

Cloverleaf Parkway at a high rate of speed. *Id.* The vehicle made a right turn to go southbound on Cloverleaf and nearly struck Officer Burch's squad car. *Id.* Officer Burch immediately activated his emergency lights and siren, made a quick u-turn and pursued the Contois vehicle. *Id.* Because Officer Burch was now behind the Contois's vehicle, Officer Burch became the lead squad in the pursuit. *A-29, A-50, A-67.* At the time Officer Burch became involved, Contois had been pursued for 7.3 miles. *A-186.*

While speeding eastbound on Cloverleaf Parkway, Contois's vehicle turned southbound on Polk Avenue without stopping for the stop sign. Contois traveled southbound on Polk Avenue at a high rate of speed, going through stop signs at 91st, 89th, and 87th Avenues without stopping or slowing down. Contois's vehicle turned into a dead-end cul-de-sac on Polk, where Officer Burch believed he had the suspect cornered.[2] *A-9.* Contois, however, drove into a driveway, crossed onto a lawn and went over what was later determined to be a small retaining wall. He drove through the backyard of a home at 8484 Cottagewood Terrace. *A-4, A-29.* Contois re-entered the road traveling southbound on Cottagewood Avenue. *A-28, A-29, A-47.*

Officer Burch was closely following the Contois vehicle. He also went over the retaining wall. *A-4.* Neither Contois nor Officer Burch were aware of the existence of the retaining wall until they actually went over it. *A-4, A-52.* Officer Burch struck his head on the roof of his squad car as he went over the retaining wall. *A-29, A-52.*

Officer Burch continued to pursue the Contois vehicle on Cottagewood. As Contois slowed, Officer Burch initiated a PIT[3] maneuver. *A-49, A-50.* Officer Burch testified he

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[2] On the audiotape of the pursuit, as Contois drove into the dead-end cul-de-sac, Officer Burch reports, ". . . And we got him cornered. It's a dead end here . . ." *A-61.*

[3] "PIT" stands for Pursuit Intervention Tactics, which Officer Burch described as follows: "That specific technique involves coming

attempted to use the PIT maneuver twice while on Cottagewood, without success. *Id.* Officer Burch's actions caused the suspect vehicle to fishtail, but not stop. *A-30, A-49, A-50.*

As the pursuit continued, the Contois vehicle slowed to make a right turn to go westbound on the service drive of U.S. Highway 10. Officer Burch again attempted to PIT the Contois vehicle and end the pursuit. This time the suspect vehicle was successfully spun around into the grassy ditch. The suspect vehicle came to a complete stop with the engine killed. Officer Burch made a quick u-turn, and started back toward the location of the suspect vehicle, believing the pursuit was over. *A-31, A-57.*

Contois, however, was able to get his vehicle started. He drove his vehicle up out of the ditch and began speeding in the wrong direction on Highway 10, heading eastbound in the westbound lanes of traffic. Officer Burch began pursuing the suspect again. He testified, because of the immediate danger to oncoming traffic, he struck the Contois vehicle with his squad car to prevent a head on collision with oncoming traffic.[4] The force of this impact knocked Contois out of the westbound lane, down into the center median whereupon Contois re-entered Highway 10 traveling eastbound in the eastbound traffic lanes. After a short distance, Contois entered Highway 65, traveling southbound. *A-31, A-32, A-53, A-54, A-55, A-56.*

Spring Lake Park Police Officer Douglas Ebeltoft had been monitoring the pursuit. *A-181, A-182.* Officer Ebeltoft

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alongside so that your front end is just slightly alongside the suspect vehicle's rear end and turn into it and push it so the car spins." *A-49, A-50.*

[4] This is the first point in the pursuit in which any other vehicles driving on the road, other than those involved in the pursuit, are observed by Officer Burch. Officer Burch did not observe any pedestrian traffic at any time during the pursuit. *A-48.*

positioned his squad car at the Highway 10 service road near the border of Blaine and Spring Lake Park. *A-182.* As he observed the Contois' vehicle approach him, he activated his emergency lights and siren and attempted a rolling roadblock. *Id.* Officer Ebeltoft joined the pursuit as Contois fled on Highway 10 and onto Highway 65. *Id.*

Because the Contois vehicle was damaged, Officer Burch believed the pursuit would end at any moment because of the problems he could observe. However, Contois was able to maintain control of his vehicle and continued to flee westbound on 81st Avenue from Highway 65, still traveling at a very high rate of speed. *A-32, A-58, A-59.*

When the pursuit entered the City of Spring Lake Park, Officer Ebeltoft was behind Officer Burch on Highway 10 and 81st Avenue, traveling at speeds of 80 mph. *A-183, A-184.* Officer Ebeltoft never saw a need to terminate the pursuit and did not suggest Officer Burch do so. *A-62, A-183, A-184, A-185.*

While speeding westbound on 81st, Contois entered the intersection at University Avenue against a red light and collided with a pickup truck driven by Timothy Helseth, resulting in tragic injuries to Helseth and the death of his front-seat passenger, Jeremy Carrigan. Officer Burch estimated the Contois' vehicle's speed was 80-100 mph at the time of impact. *A-32, A-54.*

2. The Blaine Police Department Policy.[5]

The Blaine Police Department pursuit policy provided that officers involved in a high-speed chase must continually assess whether the seriousness of the violation justifies

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5 Petitioner spends a great deal of time discussing Officer Burch's driving conduct and his interactions with the City of Blaine. Pet. pp. 7-8. However, these issues have no bearing on this Petition because they related to Helseth's Monell claims against the City of Blaine, which were dismissed by the District Court and not appealed to the Eighth Circuit.

continuing pursuit. *A-214.* Officer Burch testified he was aware that during a high-speed chase, a police officer must continually analyze conditions along the chase route and assess whether pursuit should continue. *A-48.* The policy allows an officer discretion regarding the engagement of pursuit and termination of pursuit. *A-214.* In deciding whether to discontinue a chase, officers are instructed to consider "present danger, seriousness of [the] crime, length of the pursuit, whether or not the application of deadly force by the pursuing officer is justified, and the possibility of identifying the suspect at a later time." *Id.*

Furthermore, the policy does not prohibit the use of "ramming" to terminate a pursuit. Rather, the policy allows for the "intentional officer contact between the officer's vehicle and the target vehicle" with the shift supervisor's approval.[6] *A-220.* Officer Burch reasonably believed by initiating contact with Contois' vehicle, he could stop the pursuit. Indeed, he was able to stop the suspect vehicle in the ditch by the service road to Highway 10. However, Contois was able to restart his vehicle and commence a new pursuit.

B. The District Court's Decision.

Petitioner commenced this action in the United States District Court for the District of Minnesota on January 20, 1998. Federal jurisdiction was based on 28 U.S.C. § 1343. The Complaint alleged, *inter alia*, Burch violated petitioner's rights under the Fourteenth Amendment to the United States Constitution by depriving him of his liberty when Contois' fleeing vehicle collided with his vehicle at a high rate of speed. After discovery, Burch moved for summary judgment on the substantive due process claim, relying principally on County of Sacramento v. Lewis, 523 U.S. 833 (1998).

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[6] There was no shift supervisor on duty at the time of this pursuit. Officer Burch was the senior officer on duty. *A-48.*

The District Court, relying on Feist v. Simonson, 222 F.3d 455 (8th Cir. 2000), denied Burch qualified immunity, stating evidence could possibly support a finding that Burch conducted the pursuit with deliberate indifference to public safety and to petitioner's rights. Alternatively, applying Lewis, the Court denied Burch qualified immunity stating the evidence could support a finding that Burch intended to harm Contois and his passengers by engaging in the PIT maneuvers.

C. The Court of Appeals Ruling.

On appeal, the United States Court of Appeals for the Eighth Circuit, initially sitting *en banc*, overruled the panel's decision in Feist,[7] and the District Court's decision. The Eighth Circuit held "the intent-to-harm standard of Lewis applies to all § 1983 substantive due process claims based upon the conduct of public officials engaged in a high-speed automobile chase aimed at apprehending a suspected offender." Pet. p. 9a. Furthermore, the Court determined Burch used the PIT maneuver in an attempt to apprehend the Contois vehicle and the "only harm intended by this conduct was incidental to Burch's legitimate objective of arresting Contois." Pet. p. 10a. Judges McMillian and Bye dissented.

SUMMARY OF ARGUMENT

Petitioner's Writ of Certiorari should be denied. This Court has clearly held: "in a high-speed automobile chase aimed at apprehending a suspected offender ... only a purpose to cause harm unrelated to the legitimate object of

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7 Feist was decided on July 24, 2000. Immediately following the decision, Simonson filed a Petition for Rehearing En Banc. While the Petition was pending, the case settled. On October 11, 2000, the Eighth Circuit issued an Order dismissing the Petition for Rehearing En Banc. Judges Bowman, Beam, Loken & Hansen dissented on this Order. See fn1 Pet. 3a

arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a [substantive] due process violation." 523 U.S. at 836. Furthermore, the Eighth Circuit's decision only resolved a conflict between itself, resulting from Feist, and the rest of the United States Court of Appeal Circuits.

Finally, Petitioner incorrectly attempts to apply the Fourth Amendment to police pursuits. This Court dismissed this argument in Lewis. 523 U.S. at 842-45 & n.7. Therefore, Petitioner's Writ of Certiorari should be denied.

REASONS FOR DENYING PETITION FOR A WRIT OF CERTIORARI

The Eighth Circuit's *en banc* opinion does not impermissibly expand this Court's holding in County of Sacramento v. Lewis. Rather, the opinion, by overruling Feist, corrected the conflict between the Eighth Circuit and the other circuits.

I. CERTIORARI SHOULD BE DENIED BECAUSE THE EIGHTH CIRCUIT DECISION DOES NOT CONFLICT WITH ANY OTHER FEDERAL COURT OF APPEALS DECISION.

Since Lewis, all other circuits that have examined the issue of the proper culpability standard in high-speed police pursuit cases have applied the intent-to-harm standard. See Trigalet v. City of Tulsa, 239 F.3d 1150, 1155 (10th Cir. 2001); Davis v. Township of Hillside, 190 F.3d 167, 170 (3rd Cir. 1999), cert. denied, 528 U.S. 1138 (2000); Onossian v. Block, 175 F.3d 1169, 1171-72 (9th Cir.), cert. denied, 528 U.S. 1004 (1999); Salamacha v. Lynch, 1998 WL 743905, at *5 (2nd Cir. Sept. 25, 1998). The Eighth Circuit's decision, in overruling Feist v. Simonson, corrected the conflict between the Eighth Circuit and the other circuits.

Petitioner is unable to cite a single circuit, which conflicts with the Eighth Circuit's decision. Sup. Ct. R. 10. Rather, Petitioner only cites at length the dissenting opinions in Helseth. These opinions are unpersuasive in light of Lewis and the other Federal Court of Appeals decisions applying Lewis. Accordingly, Petitioner's Writ of Certiorari should be denied.

II. THE INTENT TO HARM STANDARD IS THE PROPER CULPABILITY STANDARD IN HIGH SPEED CHASES.

Petitioner contends the Eighth Circuit misapplied the intent-to-harm standard in the present high-speed chase. Essentially, Petitioner is arguing the Eighth Circuit, sitting *en banc*, misapplied the facts to the properly stated rule of law. The petition for a writ of certiorari should not be granted based upon this argument. See Sup. Ct. R. 10.

A. Fourth Amendment analysis is not proper in police chases where there has been no seizure.

Petitioner contends the facts of the high-speed pursuit should be analyzed under Tennessee v. Garner, 471 U.S. 1 (1985) since there was contact between the police car and the suspect's car. Pet. p. 15. However, this Court has already rejected this argument in Lewis. See Lewis, 118 S.Ct. 1708, 1715 (Fourth Amendment seizure occurs "'only when there is a governmental termination of freedom of movement through means intentionally applied.'") (quoting Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989)); see also Davis v. Township of Hillside, 190 F.3d at 171 (deliberate ramming of a fleeing suspect's car "does not permit an inference of intent to harm" under Lewis).

Here, Officer Burch employed the PIT maneuver four times in an attempt to stop the fleeing Contois vehicle and

apprehend its driver. App. p. 10a. The only harm intended by Burch's conduct was incidental to his legitimate objective of arresting Contois. Furthermore, the PIT maneuvers did not terminate Contois' freedom of movement because he continued in his high-speed flight. It was during this post-PIT maneuver flight that Contois struck Helseth's vehicle. Officer Burch had no intent to harm Helseth or to use Helseth's vehicle to stop Contois' vehicle. See Brower, 489 U.S. at 596-97. Therefore, analysis under the Fourth Amendment is not proper.

B. Officer Burch's conduct was incidental to a legitimate law enforcement objective.

Petitioner contends the Eighth Circuit misapplied the facts to the proper standard of law when it determined Officer Burch's use of the PIT maneuver was incidental to the legitimate objective of arresting Contois. Pet. pp. 14-15. This second-guessing is not proper for review. It is also not supported by the record. To the contrary, the record demonstrates Officers Burch, Bott and Ebeltoft risked their own safety in an effort to stop Contois from continuing his criminally dangerous high speed driving and to remove him from the public highway.

III. COUNTY OF SACRAMENTO V. LEWIS APPLIES TO CLAIMS BROUGHT BY INNOCENT BYSTANDERS INJURED IN POLICE PURSUITS.

Petitioner contends certiorari should be granted to clarify whether Sacramento v. Lewis applies to claims brought by innocent bystanders injured in police pursuits. Pet. pp. 24-26. However, this Court in Lewis, clearly addressed this issue. Lewis involved the death of an innocent passenger on a motorcycle fleeing a police officer. The passenger's heirs, not the driver-suspect, brought the

claim against the law enforcement officer. This Court determined "only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." Lewis, 523 U.S. at 836.

Furthermore, circuit courts have applied Lewis to innocent bystanders. See Medeiros v. O'Connell, 150 F.3d 164, 170 (2nd Cir. 1998) (Lewis shocks the conscience standard applies to lawsuit brought by mother of teenage hostage who was killed during an attempt to capture the hostage taker); Davis, 190 F.3d at 171 (Lewis intent to harm standard applies to claim brought by innocent bystander); Claybrook v. Birchwell, 199 F.3d 350, 360-61 (6th Cir. 1999) (Lewis shocks the conscience standard applies to claim brought by innocent bystander injured during an exchange of gunfire); Schaefer v. Goch, 153 F.3d 793, 798 (7th Cir. 1998) (Lewis intent to harm standard applies to claim brought by parents of innocent bystander killed during a standoff with a suspect); Moreland v. Las Vegas Metro. Police Dep't, 159 F.3d 365, 372 (9th Cir. 1998) (Lewis shocks the conscience standard applies to "cases where it is alleged that an officer inadvertently harmed a bystander while responding to a situation in which the officer was required to act quickly to prevent an individual from threatening the lives of others."); Onossian, 175 F.3d at 1172 (applying shocks the conscience standard to claim brought by innocent motorist struck by fleeing suspect); Torres v. Bonilla, 185 F.3d 869 (9th Cir. 1999) (unpublished) (applying intent-to-harm standard to claim brought by innocent bystander injured by fleeing suspect), cert. denied, 120 S.Ct. 498 (1999); Childress v. City of Arapaho, 210 F.3d 1154, 1157-58 (10th Cir. 1998) (recognizing Lewis principles apply "whether the claimant is a police suspect or an innocent victim.").

Petitioner is unable to cite a single circuit, which states Lewis principles do not apply to innocent bystanders. Instead, Petitioner relies on Judge Bye's dissent in the current

case, which also does not cite a single circuit, which holds Lewis does not apply to innocent bystanders.

The Eighth Circuit has not arbitrarily extended Lewis principles to innocent bystanders as claimed. Rather, the Eighth Circuit followed this Court's direction and the decisions of all other circuits. Therefore, Petitioners Writ for Certiorari should be denied.

IV. THE DELIBERATE INDIFFERENCE STANDARD DOES NOT APPLY TO THIS CASE.

Petitioner contends the deliberate indifference standard should be applied in this case. Pet. pp. 28-30. This is the same argument the Eighth Circuit rejected. Furthermore, the facts of the case show Burch did not have "time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations." Lewis, 523 U.S. at 853.

Rather, Officer Burch was faced with ever changing circumstances. Officer Burch had to continually evaluate roadway configuration, traffic on the roadway, the number of cars on roadways that intersected the chase route, appurtenant structures, and the suspect's actions. He observed Contois flee on city streets, through back yards and on roads known to have heavy traffic. While engaging in a high-speed pursuit, he had to determine the best method to get the suspect vehicle to stop, whether and how to use a PIT maneuver, all while trying to remain in contact with the radio dispatch center. The instantaneous decisions made by Officer Burch are precisely the type of decisions this Court dealt with in Lewis.

Petitioner argues for a case-by-case analysis in each high-speed pursuit to determine whether there was sufficient time to deliberate. Whitley v. Albers, 475 U.S. 312, 320, (1986), a case on which the Lewis Court explicitly relied, adopted the intent-to-harm standard for a two-hour prison

riot. The Whitney Court stated "a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance." Id. at 320. The deliberate indifference standard does not apply to this case and Petitioner's Writ of Certiorari should be denied.

V. THE UNITED STATES SUPREME COURT HAS DENIED CERTIORARI ON THE IDENTICAL ISSUES PRESENTED BY PETITIONER.

Following Lewis, several cases interpreting Lewis have come before the Court on Petitions for Writ of Certiorari. Those cases also requested this Court grant Writ of Certiorari on the identical issues Petitioner presents here. For example, Petitioner seeks review of the Eighth Circuit's en banc decision in Helseth on the grounds that, "certiorari should be granted to clarify whether Sacramento v. Lewis applies to claims brought by innocent bystanders injured in police pursuits." Pet. p. 24. In Onossian v. Block, 175 F.3d 1169 (9th Cir.), and Torres v. Bonilla, (9th Cir., May 28, 1999) (unpublished), cert. denied, 528 U.S. 1004, 120 S. Ct. 498 (1999) an identical question was presented for review by the Petitioner – "Does Sacramento County v. Lewis apply to wholly innocent bystanders who are injured as a result of police vehicle pursuits?" Pet. for Cert. filed, 68 U.S.L.W. 3275 (U.S. Oct. 26, 1999) (No. 68-15). Because this Court previously denied certiorari for these cases, this Petition should also be dismissed.

Petitioner also argues Lewis is unworkable as applied to cases involving innocent bystanders. Pet. p. 13. In Torres and Onossian, a similar issue was presented for review – "In police vehicle pursuit cases, does 42 U.S.C. § 1983 action claiming violation of due process lie against state officers when state affords no process at all, by having enacted

immunity statute that bars all redress for injuries suffered by innocent bystanders who are harmed by police pursuit?" Pet. for Cert. filed, 68 U.S.L.W. 3275 (U.S. Oct. 26, 1999) (No. 68-15). Again, certiorari was denied, 528 U.S. 1004, 120 S. Ct. 498 (1999).

Petitioner seeks review of the issue of whether use of deadly force constitutes evidence under Lewis of a purpose to cause harm unrelated to the legitimate object of arrest. Pet. pp. 14-24. Again, this issue has been presented to the Supreme Court for review in a post-Lewis decision. In Davis v. Township of Hillside, 190 F.3d 167, 170 (3rd Cir. 1999), cert. denied, 528 U.S. 1138, 120 S.Ct. 982 (2000), the petitioner presented the following issue for review:

> "Were Fourth and/or 14th Amendment rights of innocent bystander violated when pursuing police officers in high-speed vehicular pursuit employed ramming maneuver in full violation of their department's own pursuit regulations, which equate such maneuver with use of deadly force?"

Pet. for Cert. filed, 68 U.S.L.W. 3436 (U.S. Jan. 11, 2000) (No. 68-25). This Court denied certiorari. 528 U.S. 1138, 120 S.Ct. 982 (2000).

In addition, Petitioner argues that Respondent had time to deliberate his actions and therefore, the deliberate indifference standard should apply rather than the intent to injure standard set forth in Lewis. That issue was previously brought to this Court on Petition for Review in Torres and Onossian as follows:

> Is it proper to grant judgment as a matter of law to police pursuit defendants in action under § 1983 when facts show that those defendants had time actually to deliberate their actions or actually did deliberate their actions?

Pet. for Cert. filed, 68 U.S.L.W. 3275 (U.S. Oct. 26, 1999) (No. 68-15), cert. denied, 528 U.S. 1004, 120 S.Ct. 498 (1999).

Finally, Petitioner argues review is appropriate because Officer Burch's conduct allegedly violated clearly established law, including departmental policies on use of deadly force as to a fleeing misdemeanant. Pet. pp. 14-18. Again, Davis addressed similar issues for which certiorari was denied:

> "Is blatant and knowing violation of established police guidelines type of conduct that is sufficiently outrageous to invoke potential civil liability, in case in which fleeing suspect is guilty of nothing more serious than motor vehicle violation and officers' conduct injures innocent bystanders?"

Id., Pet. for Cert. filed, 68 U.S.L.W. 3436 (U.S. Jan. 11, 2000) (No. 68-25), cert. denied, 528 U.S. 1138, 120 S.Ct. 982 (2000).

There are no unique factual or legal issues in this case sufficient to warrant this Court to depart from its prior consideration of identical petitions. Consequently, the holding by the Eighth Circuit in Helseth, neither conflicts with decisions of the other circuits, nor the United States Supreme Court on the same issue.

CONCLUSION

In Helseth, the Eighth Circuit, sitting en banc, overruled an erroneous panel decision in Feist and placed the Eighth Circuit in conformity with Lewis and all the other circuits that have interpreted Lewis. Petitioner requests the Court to reinstate the error of Feist, and ignore Sacramento v. Lewis, and all other circuits that have appropriately relied upon and applied Lewis. The Petition for Certiorari should be denied.

Respectfully submitted,

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